

(2)
No. 86-1473

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

— 0 —
CHARLOTTE LOUISE WILSON, individually, and as
Personal Representative of the Estate of DAROLD
FLOYD WILSON, and as Guardian of JOLENE KAY
WILSON, CRAIG ALLEN WILSON and JERRY
TODD WILSON,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD
COMPANY, a corporation,

Respondent.

— 0 —
**ON PETITION FOR A WRIT OF CERTIORARI
TO THE TENTH CIRCUIT
COURT OF APPEALS**

— 0 —
RESPONDENT'S BRIEF IN OPPOSITION

— 0 —
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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Tenth Circuit err when it determined that the trial court arrogated the jury's function of assessing witness credibility by granting Petitioner a new trial based on alleged perjury when the issue of perjury was covered on cross-examination, in closing argument, and where the jury was appropriately instructed concerning witness credibility at the first trial?

LIST OF PARTIES

The only parties are those listed in the caption. Burlington Northern Railroad Company is a subsidiary of Burlington Northern, Inc. which has the following other subsidiaries:

- BN Financial Service Inc.
- BN Geothermal Inc.
- BN Leasing Inc.
- Burlington Northern Foundation
- Burlington Northern International Services Inc.
- Burlington Northern Motor Carriers Inc.
- Burlington Northern Overseas Finance Company, N.V.
- CBR Distribution Corporation
- Colt Intermodal Inc.
- Glacier Park Company
- Glacier Park Liquidating Company
- Meridian Minerals Company
- M-R Holdings
- National Exchange, Inc.
- New Mexico and Arizona Land Company
- Plumb Creek Timber Company, Inc.
- Research Applications Inc.
- The El Paso Company

Burlington Northern Railroad Company has an interest in the following companies:

- The Belt Railway Company of Chicago
- Burlington Northern Dock Corporation
- Burlington Northern (Manitoba) Limited
- Burlington Northern Railroad Properties Inc.
- Camas Prairie Railroad Company
- Clarkland Royalty, Inc.
- Davenport, Rock Island and North Western Railway Company
- The Denver Union Terminal Railway Company
- Houston Belt & Terminal Railway Company
- Iowa Transfer Railway Company
- Kansas City Terminal Railway Company

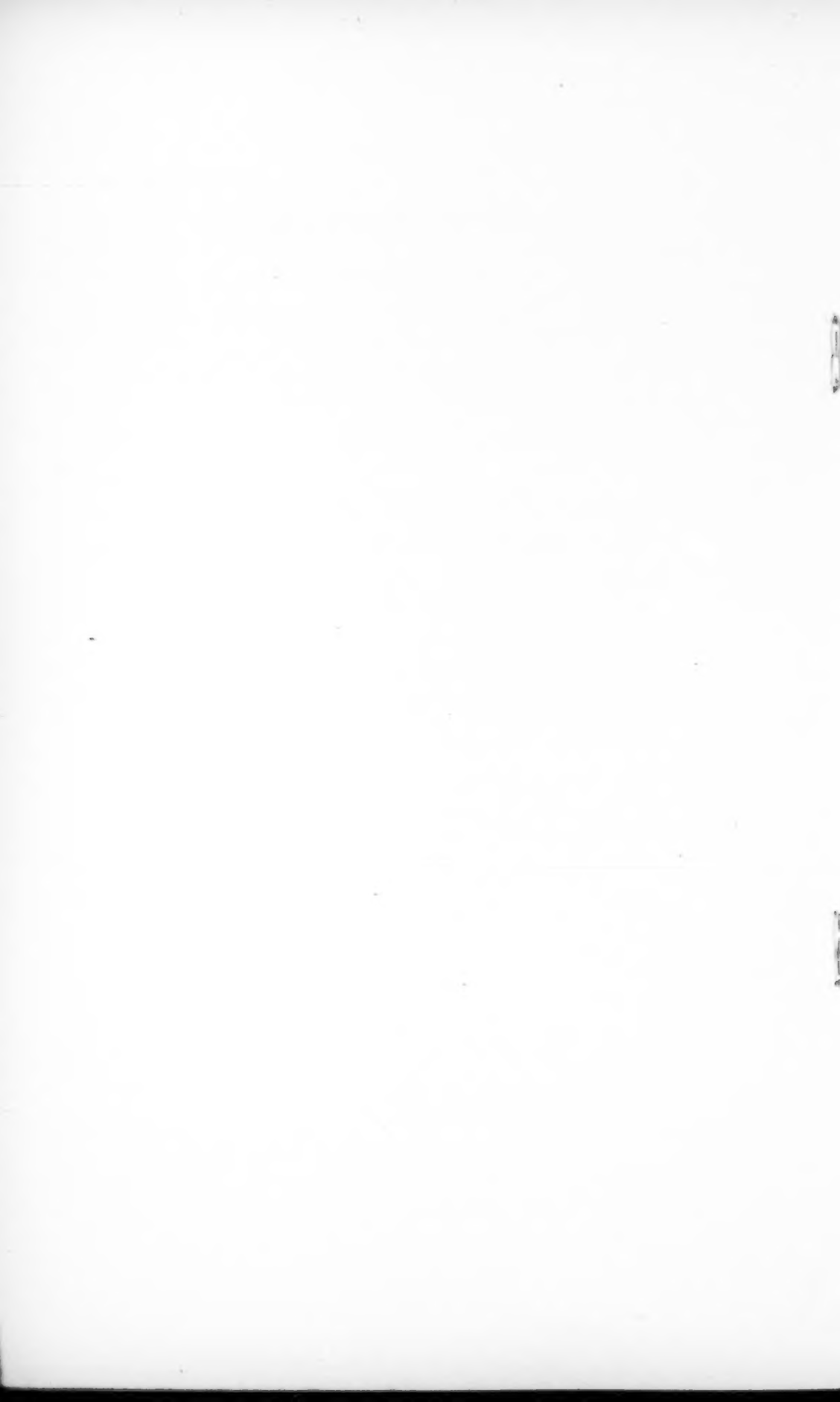
Keokuk Union Depot Company
The Lake Superior Terminal and
Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railway Company
Paducah & Illinois Railway Company
Portland Terminal Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Western Fruit Express Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company
Northern Radio Ltd.

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**ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Burlington Northern Railroad Co., respectfully requests this Court to deny the Petition for Writ of Certiorari of Charlotte Louise Wilson, *et al.*, seeking review of the decision of the United States Court of Appeals for the Tenth Circuit. That opinion is set forth in its entirety as Appendix B to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner, a Plaintiff whose action was twice tried, seeks review of the Tenth Circuit's decision reinstating the verdict in the first trial of the underlying action. The action arose out of Petitioner's decedent's death when a bridge on Respondent's railway washed away during a flash flood. At the first trial, the jury found the decedent 75% negligent and Respondent 25% negligent. The trial court granted Petitioner's motion for a new trial based on alleged perjury committed by plaintiff's witness, Joseph Cuccia, a railroad employee. The Tenth Circuit reversed, holding that Cuccia's credibility was properly before the jury at the first trial, through cross examination as an adverse witness, in closing argument and in the trial court's instructions. With that background, the Tenth Circuit found that the trial court had "[a]rrogated the jury's function . . ." (*Opinion*, Appendix B to the Petition for Writ of Certiorari).

ARGUMENT:

REASONS FOR DENYING THE WRIT

There is no conflict among the circuits regarding a trial court's discretion in granting new trials. The Tenth Circuit opinion is consistent with this Court's prior decisions holding that matters in issue are within the province of the jury.

Furthermore, regarding perjury, Justice Brennan (then sitting on the New Jersey Supreme Court) stated in *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952):

“... a court may not set aside a verdict merely because some testimony is perjured. * * * Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfying evidence to have been, not false merely, but to have been wilfully and purposely given, and to have been material to the issues tried and not merely cumulative but probably to have controlled the result. *Further, a party seeking to be released from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial.* . . .” 88 A.2d at 208. (Emphasis supplied).

The Tenth Circuit acted in accordance with this theme, and ruled appropriately. Therefore, Petitioner's Writ of Certiorari is without merit and does not warrant this Court's review.

I. The Tenth Circuit's Decision Represents No Split of Opinion among the Circuits Regarding a Trial Court's Authority to Exercise Discretion In Granting New Trials.

The Tenth Circuit's opinion is fully consistent with the Seventh and Ninth Circuits' decisions relied upon by Petitioner in that all are cognizant of a trial court's discretionary authority to grant new trials or vacate judgments. However, the Tenth Circuit implicitly held that in this instance the trial court abused its discretion by arrogating the jury's function of assessing witness credibility.

The cases cited by Petitioner, *Atchison, Topeka & Santa Fe Railway Co. v. Barrett*, 246 F.2d 846 (9th Cir. 1957) and *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145 (7th Cir. 1966), both concerned review of

FRCP 60(b) motions based upon perjury discovered *after* trial. The present matter concerns a Rule 59 motion based upon alleged perjury that was fully addressed and *argued* during trial.

The Tenth Circuit quickly recognized Petitioner had vigorously cross examined witness Cuccia, had reminded him of his oath, had devoted a substantial portion of closing to attacking Cuccia's veracity, and that the trial judge instructed the jury accordingly. (*Opinion* Appendix B to Petitioner's Petition for Writ of Certiorari, p. 10a). This recognition is entirely consistent with the very case Petitioner asserts to be inconsistent. In *Barrett, supra*, the court stated: "Not only must there be clear and convincing evidence of fraud, but it must be such as prevented the losing party from fully and fairly presenting his case or defense." 246 F.2d at 849. It is interesting to note that Petitioner conveniently omitted this sentence from the very paragraph she quoted from *Barrett, supra*. (See Petitioner's Brief, p. 9).

Therefore, the inconsistency among the circuits asserted by Petitioner is illusory.

II. The Tenth Circuit's Decision Appropriately Relies upon Prior Supreme Court Decisions Establishing that Witness Credibility Is a Matter Peculiarly for the Jury.

The appellate opinion manifests its keen awareness that Cuccia's testimony was directly in issue. Because that testimony was in issue, and because it was fully developed and vigorously attacked at trial, the Tenth Circuit appropriately relied upon this Court's prior decisions establishing that it is the jury's function to assess witness credibility. Particularly relevant is the court's reliance

on *Ellis v. Union Pacific Railroad Co.*, 329 U.S. 649 (1947) wherein this Court stated “[t]he decision as to which witness was telling the truth . . . [is a] question for the jury.” 329 U.S. at 653.

It is therefore clear that the Tenth Circuit’s reliance on this Court’s prior decisions was both appropriate and mandated.

III. The Tenth Circuit’s Decision Reinforces the Integrity of the Jury System and Perpetuates the Administration of Justice by Allowing the Jury to Perform its Function Properly.

The Tenth Circuit’s decision supports the maxim that it is within the jury’s province to decide matters properly before it. This maxim has been repeatedly reiterated. See *e.g.*, *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Baker v. Norfolk & Western Railway Co.*, 311 F.Supp. 1405 (E.D. Va. 1970); and *Myers v. Reading Co.*, 331 U.S. 477 (1947).

This Court has stated:

“Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury’s verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.” *Lavender v. Kurn*, 327 U.S. 645 at 653 (1946).

In this case, the Court of Appeals correctly observed that there was, indeed, ample evidence to support the verdict, and was therefore correct in holding that the trial court arrogated the jury’s function. To have held otherwise would have affronted the integrity of the jury system.

CONCLUSION

Where the Tenth Circuit's opinion properly relied on prior Supreme Court decisions and the circuits are in accord regarding a trial court's discretion to grant new trials, this issue does not merit this Court's consideration.

Respectfully submitted,

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